

No. 13110

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL NELSON, Individually, and as an Heir, Devisee
and Legatee of Olof Zetterlund, Deceased, Suing on
His Own Behalf and on Behalf of All Other Heirs,
Devisees and Legatees of Olof Zetterlund, Deceased,
Similarly Situated,

Appellant,

vs.

DORA MILLER and HAROLD M. DAVIDSON, Both Indi-
vidually and as Pretending Co-Executors *de son tort*,
of the Estate of Olof Zetterlund, Deceased,

Appellees.

BRIEF OF APPELLANT.

O'CONNOR & O'CONNOR,
530 West Sixth Street,
Los Angeles 14, California,

Attorneys for Appellant.

FILED

Of Counsel,

C. A. HIAASEN,

Broward National Bank Building,
Fort Lauderdale, Florida,

JAN 14 1952

PAUL P. O'BRIEN
CLERK

TOPICAL INDEX.

	PAGE
I.	
Jurisdiction	1
II.	
Preliminary statement	2
III.	
Issues	4
IV.	
Facts	4
V.	
Argument	11
VI.	
Conclusion	17

TABLE OF AUTHORITIES CITED.

CASES	PAGE
Commissioner v. Sunnen, 333 U. S. 591.....	15
Cook v. Cook, 20 U. S. Law Week 4033, 96 L. Ed. 94.....	13
Davis v. Davis, 305 U. S. 32.....	12, 13
Freeman v. Bee Machine Co., 319 U. S. 448.....	14
Hughes v. Fetter, 341 U. S. 609, 71 S. Ct. 980, 95 L. Ed. 1212..	13
Johnson v. Muelberger, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 522	13
Michigan Trust Co. v. Ferry, 228 U. S. 346.....	14
Miller v. Nelson, 160 Fla. 410, 35 So. 2d 288.....	3, 9
Morris v. Jones, 329 U. S. 671.....	14
New York ex rel. v. Halby, 330 U. S. 610.....	14
Riley v. New York Trust Co., supra.....	16
Roche v. McDonald, 275 U. S. 449.....	16
Sherrer v. Sherrer, 334 U. S. 343.....	11, 13

STATUTES

California Code of Civil Procedure, Sec. 1933.....	13
Florida Probate Law, Sec. 732.01.....	16
United States Constitution, Art. IV, Sec. 1.....	2, 12, 13

No. 13110

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SAMUEL NELSON, Individually, and as an Heir, Devisee and Legatee of Olof Zetterlund, Deceased, Suing on His Own Behalf and on Behalf of All Other Heirs, Devisees and Legatees of Olof Zetterlund, Deceased, Similarly Situated,

Appellant,

vs.

DORA MILLER and HAROLD M. DAVIDSON, Both Individually and as Pretending Co-Executors *de son tort*, of the Estate of Olof Zetterlund, Deceased,

Appellees.

BRIEF OF APPELLANT.

I.

Jurisdiction.

The appellant is an adult resident and citizen of the State of New Jersey, and Executor of the Estate of Olof Zetterlund, deceased, by order of the Probate Court of the State of Florida, and the appellees are adult residents and citizens of the State of California and pretending Co-executors of the Estate of Olof Zetterlund, deceased, and the amount involved is in excess of \$3,000.00.

In the controversy appellant requests that full faith and credit be given to the judgment rendered by the Con-

stitutional Courts of the State of Florida in accordance with Section 1, Article IV of the Constitution of the United States of America.

II.

Preliminary Statement.

Olof Zetterlund died in Los Angeles County in the State of California on August 21, 1945. The original Last Will and Testament of Olof Zetterlund, dated June 9, 1937, was filed for probate in the County Judge's Court in and for Dade County, State of Florida and on September 5, 1945 the said Last Will and Testament was admitted to probate in the Florida court.

On October 2, 1945 appellees, Dora Miller and Harold M. Davidson, filed a petition in the County Judge's Court in and for Dade County, State of Florida, praying:

(1) That the Order admitting the Last Will and Testament of Olof Zetterlund, deceased, to probate, be revoked;

(2) That the County Court of Dade County, State of Florida, declare Olof Zetterlund to be a resident of Los Angeles County, State of California at the time of his death;

(3) That the said Florida Court admit a Codicil to the Last Will and Testament of Olof Zetterlund, deceased, for probate and ancillary proceedings in the State of Florida; (The Codicil was dated August 3, 1945 and named appellees, Dora Miller and Harold M. Davidson as Co-executors.)

(4) That appellees be appointed Ancillary Executors of the Last Will and Testament, and the Codicil thereto, of Olof Zetterlund, deceased.

The State of California, through its Comptroller, also filed a petition with the appellees herein in the Florida Court, contending that the decedent was a resident of the State of California at the time of his death. A hearing was had on the petition filed by Dora Miller and Harold M. Davidson, appellees herein, and the State of California, and judgment was entered, denying the petitions filed by the appellees and the State of California and ordering: (1) that the Last Will and Testament of Olof Zetterlund, dated June 9, 1937, be admitted to probate in the State of Florida; (2) that Olof Zetterlund was a resident of the State of Florida at the time of his death; (3) that the purported Codicil not be admitted to probate; and (4) that the appellees not be appointed Ancillary Executors of the estate of Olof Zetterlund, deceased, and further ordering that the appellant be appointed Executor of the said estate.

The appellees appealed from the judgment of the County Judge's Court to the Circuit Court for the Eleventh Judicial Circuit, in and for Dade County, State of Florida. The said Circuit Court affirmed the judgment of the lower court. The appellees herein again appealed from the said Circuit Court to the Supreme Court of the State of Florida. The Supreme Court of the State of Florida affirmed the judgments of the lower courts. (*Dora Miller, et al. v. Nelson*, 160 Fla. 410, 35 So. 2d 288.)

The Probate Court in the State of Florida ordered the appellees to deliver and transfer all assets in their possession belonging to the estate of Olof Zetterlund, to the appellant herein, as Executor. This the appellees declined to do. The appellant thereupon filed this suit in the United States District Court in and for the Southern

District of California to compel compliance with the judgment entered in the State of Florida, on the basis that the said action in Florida having been instituted by the appellees, the judgment entered against them is *res judicata* and that the said judgment is entitled to full faith and credit pursuant to the Constitution of the United States, and that the appellees be compelled to deliver and transfer all of the property in their possession belonging to the said estate.

III.

Issue.

Is the judgment heretofore entered against the appellees by the Constitutional Courts of the State of Florida in a proceeding instituted by the appellees entitled to full faith and credit in the United States District Court in and for the Southern District of California, and is the said judgment *res judicata* as to the issues presented by the appellees therein?

IV.

Facts.

Olof Zetterlund died on August 21, 1945 in the County of Los Angeles, State of California. [Tr. 86.] On September 6, 1945 the Last Will and Testament of Olof Zetterlund, which was dated June 9, 1937, was admitted to domiciliary probate in the Florida Court. [Tr. 29-30.] On October 2, 1945 Dora Miller and Harold M. Davidson, appellees herein, filed their petition in the County Judge's Court in and for Dade County, State of Florida, for revocation of probate, which petition prayed:

(1) That the Order admitting the Instrument alleged to

be the Last Will and Testament of Olof Zetterlund, entered February 6, 1945 by the Florida Court, be revoked; (2) That the Court declare Olof Zetterlund to be a resident of the County of Los Angeles, State of California at the time of his death; (3) That the Court admit the exemplified Codicil to the Last Will and Testament of Olof Zetterlund, with Will annexed, for probate and ancillary proceedings in the said Court; (4) That Dora Miller and Harold M. Davidson, appellees herein, be appointed Ancillary Executors of the Last Will and Testament, and Codicil thereof, of Olof Zetterlund, deceased. [Tr. 31.] The State of California, through its Comptroller, joined in the petition and petitioned the Florida Court for a determination that the decedent was a resident of the State of California at the time of his death. The appellees herein presented to the Court in the State of Florida an alleged Codicil to the Last Will and Testament of Olof Zetterlund, which Codicil was dated August 3, 1945, naming and appointing Dora Miller and Harold M. Davidson as Co-Executors of his Last Will and Testament. [Tr. 35.]

The Answer and defense to the said petition was filed by Samuel Nelson, appellant herein, and others, on October 11, 1945 in the County Judge's Court in and for Dade County, State of Florida, wherein it was denied that Dora Miller and Harold M. Davidson are Co-Executors of the estate of Olof Zetterlund, deceased, and denied that Olof Zetterlund was a resident of the County of Los Angeles, State of California at the time of his death, and alleged that he was a resident and citizen of the State of Florida at the time of his death; that the Last Will and Testament dated June 9, 1937 constituted the complete Last Will and Testament of the decedent, and

that the purported Codicil was a nullity and of no effect, and alleged that the said Codicil, dated August 3, 1945, was procured by Dora Miller and Harold M. Davidson, her attorney, through fraud and duress; that in proceedings in the Superior Court in and for the County of Los Angeles, State of California, Dora Miller and Harold M. Davidson, three months prior to the Codicil and on May 17, 1945, instituted proceedings to be appointed guardians of the said decedent, contending that he was incompetent and incapable of caring for and managing his property and his estate. Said petition was submitted to the Superior Court in and for the County of Los Angeles, State of California, and on May 23, 1945, together with medical proof and proof that the decedent was eighty-five years of age, upon receipt of such proof the Court made its Order declaring the decedent incompetent and incapable of taking care of himself and of managing his property. The defenses further alleged that at the time of the making of the Codicil on August 3, 1945, three months after being declared incompetent, and no proceeding ever having been instituted to restore the decedent to competency, the decedent was still incompetent by adjudication of the said Court and was not capable of executing a Codicil to his Last Will and Testament. The defenses further alleged that Dora Miller was the decedent's household servant and employee and that Harold M. Davidson was her attorney, and that they took advantage of the decedent. [Tr. 38-42.]

The petition of the State of California, through its Comptroller, was filed in the County Judge's Court in and for Dade County, State of Florida, on January 24, 1946. [Tr. 55.]

The issues presented in the appellees' petition, together with the petition filed by the State of California and the defenses presented thereto by the appellant herein, were tried in the County Judge's Court in and for Dade County, State of Florida, Honorable W. F. Blanton, Judge Presiding, and on December 31, 1946 judgment was entered denying the petitions and adjudicating that the decedent was a resident of the State of Florida at the time of his death and denying the existence of the purported Codicil and holding that the Last Will and Testament of the said decedent was rightfully and lawfully admitted to probate in Dade County, on September 6, 1945. [Tr. 66-68.]

Order was entered by the said Court appointing the appellant herein as Executor of the said estate on January 17, 1947. [Tr. 68.]

On January 28, 1947 Dora Miller and Harold M. Davidson, appellees herein, and the State of California, filed notice of appeal to the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, State of Florida, with assignments of error from the judgment entered in the County Judge's Court, wherein it was assigned that the lower Court erred as follows:

(1) In entering the Order of January 31, 1946, concluding that the decedent was a resident of the State of Florida at the time of his death and that the Last Will and Testament of June 9, 1937 was properly admitted to probate in the County Judge's Court in and for Dade County, State of Florida;

(2) In denying the petition to revoke probate of the Will in Florida and concluding that the decedent was a resident of the State of Florida at the time of his death;

(3) In making its Order denying the petition of the appellees herein to revoke probate proceedings in Dade County, State of Florida and in declaring the decedent a resident of the State of Florida at the time of his death and in declining to appoint appellees, Dora Miller and Harold M. Davidson, Ancillary Executors in Dade County, State of Florida. [Tr. 76-77.]

On February 26, 1947 Honorable W. F. Blanton, Judge of the County Court in and for Dade County, State of Florida, made and entered an Order requiring Dora Miller and Harold M. Davidson to deliver assets to the appellant as Executor of the estate of Olof Zetterlund, deceased. [Tr. 79-84.]

The appellees herein presented their appeal to the said Circuit Court and a hearing was had on the same. On May 28, 1947 the Circuit Court for the Eleventh Judicial Circuit in and for Dade County, State of Florida, affirmed the judgment of the lower Court and held that the decedent, during his long life had always been a resident of Florida and that this had not been changed under the circumstances, because of age, condition of his health and his mental capacities, reviewed all of the evidence introduced at the hearing by the appellees and concluded that Olof Zetterlund had not acquired a new domicile and remained a resident of the State of Florida. [Tr. 85-86.]

The appellees again appealed from the judgment of the Circuit Court to the Supreme Court of the State of Florida. The Supreme Court of the State of Florida, in a detailed opinion, outlined all of the incidents of the decedent's life, commencing with the time he was born in Sweden, reviewing how he first came to the United States and resided in Florida; how he took a trip with his housekeeper, Dora Miller, at the age of eighty-three, and left Florida for the purpose of medical treatment and care in various changes of climate; reviewing, also the letters and documents which transpired between the decedent, Dora Miller, the appellee, and business associates and relatives in Florida. Upon review of the detailed evidence offered by both the appellees and the executor in the courts of the State of Florida, and referring to decedent's advanced age at the time he was declared incompetent on a petition by Dora Miller and Harold M. Davidson, and the fact that the Codicil was executed three months after petitions to have him declared incompetent, the Supreme Court of the State of Florida affirmed the judgment of the lower Courts on the proceedings instituted by the appellees in the said Court on June 28, 1948. [Tr. 98-100.] (*Dora Miller et al. v. Samuel Nelson*, 160 Fla. 410, 35 So. 2d 288.)

The appellees herein have declined to comply with the Order entered on February 26, 1947 in the Florida Court, directing Dora Miller and Harold M. Davidson to deliver assets in their possession and belonging to the estate of Olof Zetterlund, to the appellant, as Executor of the

said estate. The present complaint was filed herein predicated on the judgment rendered in the Courts of the State of Florida and upon the judgment of the action instituted there by the appellees.

The appellant contends that the appellees herein, having filed their petition in the Constitutional Courts in the State of Florida for a determination of decedent's residence, revocation of probate proceedings and recognition of the validity of purported Codicil to the Will and a request for the appellees to be appointed Ancillary Executors, has been decided upon the petition instituted by appellees in the Constitutional Courts in the State of Florida and that the judgments, having been appealed and having become final, are now *res judicata*; that the judgment of the Constitutional Courts of the State of Florida is entitled to full faith and credit in the United States District Court in and for the Southern District of California, and that the said judgment is the basis of the complaint filed in the United States District Court in and for the Southern District of California, and that the appellees should be directed to transfer and deliver all assets in their possession to the appellant as Executor of the estate of Olof Zetterlund, deceased. The appellees herein, having gone to Florida to institute suit in the State of Florida, and having had full opportunity to present all evidence and having exercised their rights to appeal to the higher Courts, and having done so, that all the issues presented therein are *res judicata* and the appellees are now bound by the judgment of the said Courts.

V.

Argument.

As Dora Miller and Harold M. Davidson, appellees herein, and the State of California, instituted a suit in the Constitutional Courts of the State of Florida, and having pursued that suit to final judgment in the said Courts, that judgment is *res judicata* as to the issues presented therein and the same are entitled to full faith and credit in the United States District Court in and for the Southern District of California.

The Supreme Court of the United States recently, in *Sherrer v. Sherrer*, 344 U. S. 343, in a situation similar in principle to the present facts, held that such a judgment was *res judicata* and that the same was entitled to full faith and credit in the courts of the United States.

In that case the wife left the matrimonial domicile in Massachusetts and went to Florida and there instituted a suit for divorce against her husband. Upon notification of the pending divorce suit, the husband appeared in the Court of Florida personally and testified. A decree of divorce was entered in that State in favor of the wife. The wife, immediately after obtaining the decree of divorce, remarried. The husband subsequently instituted a statutory action in Massachusetts for a declaration that he was justifiably living apart from his wife, whose divorce and subsequent marriage he alleged to be invalid. The Supreme Court of the United States held that the husband had appeared and participated in the divorce proceedings in the State of Florida. The decision of that court was *res judicata* as to the action and the decree was entitled to full faith and credit in Massachusetts. The *Sherrer* decision by the Supreme Court of the United

States establishes the law firmly and clearly that where parties institute or participate in legal proceedings in another state, the decisions of that State are *res judicata* as to the matters presented therein and that such a judgment is entitled to full faith and credit in another state, as provided for in Section 1, Article IV of the Constitution of the United States.

This rule was again enunciated in the case of *Davis v. Davis*, 305 U. S. 32. The petitioner therein filed a complaint in Virginia for a divorce, alleging residence in that State. The respondent appeared in the Virginia Court and challenged the residence of the petitioner and introduced evidence to show the allegations as to domicile were false and other exceptions to the Commissioner's report. The Virginia Court entered a decree holding the petitioner a resident of Virginia. The petitioner was granted a divorce. Thereafter, the petitioner applied to the District Court for the District of Columbia to have the decree modified. The respondent again appeared and endeavored to raise the fact that the petitioner was not domiciled in Virginia. This position brought into place the Full Faith and Credit Clause. The Supreme Court held that the determination of the Virginia Court on the question of domicile was conclusive upon all of the parties who appeared thereon. A portion of the Court's opinion reads as follows:

"As to petitioner's domicile for divorce and his standing to invoke jurisdiction of the Virginia Court, its finding that he was a *bona fide* resident of that State for the required time is binding upon the respondent in the courts of the District. She may not say that he was not entitled to sue for divorce in the State Court, for she appeared there and by plea

put in issue his allegations as to domicile, introduced evidence to show it false, took exceptions to the Commissioner's report, and sought to have the Court sustain them and uphold her plea. Plainly, the determination of the decree upon that point is effective for all purposes in this litigation. *Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U. S. 522."

The principle of law, as stated in the *Sherrer* and *Davis* cases, has been consistently enunciated by the Supreme Court of the United States and is so stated in the following cases:

Johnson v. Muelberger, 340 U. S. 581, 71 S. Ct. 474, 95 L. Ed. 552, Decided March, 1951;

Hughes v. Fetter, 341 U. S. 609, 71 S. Ct. 980, 95 L. Ed. 1212, Decided June, 1951;

Cook v. Cook, 20 U. S. Law Week 4033, 96 L. Ed. 94, Decided December, 1951.

In California, Section 1933 of the Code of Civil Procedure reads as follows:

"The effect of a judicial record of a sister state is the same in this State as in the state where it was made."

Article IV, Section 1 of the Constitution of the United States provides as follows:

"Full faith and credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

The Full Faith and Credit Clause and the Statute which implements it, require the judgments of the courts of one state to be given the same faith and credit in another state as they have by law or usage in the state rendering them.

Morris v. Jones, 329 U. S. 671;

New York ex rel. v. Halby, 330 U. S. 610.

In the Florida proceeding the appellees and each of them, appeared personally and by their petition put in issue: (a) the domicile of Olof Zetterlund, deceased; (b) the validity of the purported Codicil to the Last Will and Testament of Olof Zetterlund, deceased; and (c) the rights of the appellees to act as lawful Executors of the estate of Olof Zetterlund, deceased. They introduced evidence and testimony to support the allegations contained in their petitions and sought to have the Constitutional Courts of the State of Florida sustain the allegations of their petition. The Courts, having entered final judgment upon the issues presented, the judgment is effective for all purposes in this litigation. It is further emphasized that under the doctrine of continuing jurisdiction, the judgments of the Florida Courts are binding and that all orders made by the Florida Court in this probate proceedings are binding upon the appellees and are entitled to full faith and credit. The rule is well established by the Supreme Court of the United States and is enunciated in the case of *Michigan Trust Co. v. Ferry*, 228 U. S. 346, and again in *Freeman v. Bee Machine Co.*, 319 U. S. 448, that in instances where the Probate Court has made Orders, such Orders are binding upon the person who was within the jurisdiction and who participated in the probate procedure. The fact that the person may leave the state does not deprive the original state of its

jurisdiction. In the present case, under this law, where the appellees appeared and instituted proceedings in the State of Florida and the Probate Court has made Orders in response to the proceedings so instituted, such Orders remain in effect and such judgment continued to exist and jurisdiction is not lost because the appellees have left the State and returned to California. The judgments so entered are entitled to full faith and credit under the Constitution of the United States and is the basis herein for the present proceedings filed in the United States District Court.

In *Commissioner v. Sunnen*, 333 U. S. 591, the Supreme Court of the United States stated:

“It is first necessary to understand something of the recognized meaning and scope of *res judicata*, a doctrine judicial in origin. The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound ‘not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.’ *Cromwell v. Sac County*, 94 U. S. 351, 352; 24 L. Ed. 195, 197. The judgment puts an end to the cause of action, which can-

not again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment.”

By the Constitutional provision for full faith and credit “the local doctrines of *res judicata*, speaking generally, become a part of national jurisprudence. The clause of the Constitution brings to our Union a useful means for ending litigation. Matters once decided between adverse parties in any state or territory are at rest. Were it not for this full faith and credit provision, so far as the Constitution controls the matter, adversaries could wage again their legal battles whenever they met in other jurisdictions . . . That clause compels that controversies be stilled so that where a state court has jurisdiction of the parties and subject matter, its judgment controls in other states to the same extent as it does in the state where rendered.”

Roche v. McDonald, 275 U. S. 449;

Riley v. New York Trust Co., *supra*.

Section 732.01 of the Florida Probate Law is as follows:

“JURISDICTION OF COUNTY JUDGE: The County Judge shall have jurisdiction of the administration, settlement, and distribution of estates of decedents, of the probate of wills, of the establishment of lost or destroyed wills, of the granting of letters testamentary and of administration, and of all other matters usually pertaining to courts of probate.”

VI.

Conclusion.

It is respectfully submitted that the appellees, havng filed a petition in the Courts of the State of Florida praying: (1) that the probate proceedings of the Last Will and Testament of Olof Zetterlund, deceased, be revoked; (2) that the Court declare Olof Zetterlund to be a resident of the State of California at the time of his death; (3) that the Court admit the Codicil to the Last Will and Testament of Olof Zetterlund for probate and ancillary proceedings in the State of Florida; and (4) that the appellees be appointed Ancillary Executors of the Last Will and Testament of Olof Zetterlund, deceased; and having procured a judgment on their petition and having appealed that judgment to the Circuit Court of the Eleventh Judicial Circuit in and for Dade County, State of Florida, and having again appealed that judgment to the Supreme Court of the State of Florida, that such judgment is *res judicata* as to the issues presented therein and that the said judgment in the State of Florida is entitled to full faith and credit in the United States District Court in and for the Southern District of California;

Further, that the Court of competent jurisdiction in the State of Florida, having ordered the appellees to deliver all assets in their possession to the appellant as Executor of the Estate of Olof Zetterlund, is entitled to full faith and credit and should be enforced in the United States District Court in and for the Southern District

of California against the appellees and that the appellees be compelled to deliver and transfer all of the said assets to the appellant, as Executor;

Further, that the judgment of the United States District Court in and for the Southern District of California be reversed, with instructions that the lower court order the appellees to deliver to the appellant, as Executor of the said Estate, the assets described in the complaint.

Respectfully submitted,

O'CONNOR & O'CONNOR,

By EDWARD J. O'CONNOR,

Attorneys for Appellant.

Of Counsel,

C. A. HIAASEN,